APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 187

MENOMINEE TRIBE OF INDIANS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 22, 1967
CERTIORARI GRANTED OCTOBER 9, 1967

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 339-65

Filed Sep. 30, 1965

THE MENOMINEE TRIBE OF INDIANS, suing on its own behalf and as the representative of its members, or their successors, as a class; and MENOMINEE ENTERPRISES, INC., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and GORDON DICKIE, JAMES FRECHETTE, JERRY GRIGNON, and GEORGE KENOTE, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians, or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and FIRST WISCONSIN TRUST COMPANY, suing as trustee on behalf of all the beneficiaries, or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902;

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

PETITION

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1. *Jurisdiction.* Plaintiffs file this petition pursuant to 28 U.S.C. § 1505, and 28 U.S.C. § 1491.

2. *Parties plaintiff.*

(a) *Tribe.* Plaintiff, the Menominee Tribe of Indians, is a recognized tribe of Indians which has existed since time immemorial, and which has always resided in the State of Wisconsin. As of 1961 it had 3,270 enrolled members.

(b) *Corporation.* Plaintiff, Menominee Enterprises, Inc., is a corporation incorporated under the laws of the State of Wisconsin pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902. The beneficial owners of all of the outstanding stock of Menominee Enterprises, Inc. are enrolled Menominee Indians, or their successors.

(c) *Individuals.* Plaintiffs, Gordon Dickie, James Frechette, Jerry Grignon and George Kenote, are all enrolled members of the Menominee Tribe and stockholders of Menominee Enterprises, Inc.

(d) *Trustee.* Plaintiff, First Wisconsin Trust Company, is a trust company bank, incorporated under the laws of the State of Wisconsin, and is the trustee of a trust known as the Menominee Assistance Trust, whose beneficiaries are enrolled Menominee Indians who are either minors, *non compos mentis*, or persons deemed by the Secretary of the Interior to be in need of assistance in managing their affairs.

3. *Previous Action on Claims.* Except as stated herein, no action has been taken by Congress or any department of the Government, or in any judicial proceeding, with respect to the claims herein set forth.

4. *Menominee Reservation.* The Menominee Reservation, where the Menominee Tribe and most of its members presently reside, was aboriginally owned by the Tribe, and was confirmed to the Tribe by the Treaty of Wolf River, May 12, 1854, 10 Stat. 1064. This reserva-

tion was never allotted, and remained wholly owned by the Tribe until conveyed in 1961 to Menominee Enterprises, Inc., by the Secretary of the Interior pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902.

5. (a) *Hunting and Fishing Rights.* Under the aforesaid Treaty of Wolf River, the United States guaranteed to the Menominee Tribe the right to hunt and fish within the reservation free of any restrictions by the state or federal governments. This right arose from the language in Article 2, whereby the United States "do hereby give, to said Indians for a home, to be held as Indian lands are held . . .", and the express understanding of the parties that the grant was to include hunting and fishing rights.

(b) The right was owned by the Menominee Tribe for the benefit of its members until the Menominee Termination Act became effective on April 29, 1961 (26 Fed. Reg. 3726), and thereafter it was owned by the individual enrolled Menominee Indians, or by the Menominee Tribe for the benefit of its members, or by Menominee Enterprises, Inc., for the benefit of its stockholders.

(c) The Menominee Tribe enjoyed and exercised the right until the Menominee Termination Act became effective on April 29, 1961. At that time, the State of Wisconsin has since ruled, the right was abrogated. *State* v. *Sanapaw*, 21 Wis.2d 377, 124 N.W.2d 41 (1963). The U.S. Supreme Court refused to review this ruling. *Sanapaw* v. *Wisconsin*, 377 U.S. 991 (1964), rehearing denied, 379 U.S. 871 (1964).

(d) Consequently, by virtue of the 1961 proclamation pursuant to the Menominee Termination Act, the Menominee Indians have been deprived of their valuable treaty right to hunt and fish on the Menominee Reservation free of federal or state regulation, and they now

have no greater hunting and fishing rights than non-Indians.

(e) The United States owes the plaintiffs just compensation for the abrogation of this treaty right.

WHEREFORE, Plaintiffs pray that judgment be entered against defendant in an amount which will provide just compensation for the loss of hunting and fishing rights, including interest or damages for delay in payment, and demand such other relief as the facts may warrant.

/s/ Charles A. Hobbs
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APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 339-65

(Decided April 14, 1967)

THE MENOMINEE TRIBE OF INDIANS [et al.] *v.* THE UNITED STATES

Charles A. Hobbs, attorney of record for plaintiffs. *Wilkerson, Cragun & Barker* and *Angelo A. Iadarola*, of counsel.

Ralph A. Barney, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the count:

The Menominee Tribe of Indians, suing on its own behalf and as the representative of its members, or their successors, as a class; and Menominee Enterprises, Inc., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and Gordon Dickie, James Frechette, Jerry Grignon, and George Kenote, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians,

or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and First Wisconsin Trust Company, suing as trustee on behalf of all the beneficiaries, or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 68 Stat. 250, as amended, 25 U.S.C. § § 891-902 (1964), have filed this suit to collect damages from the Government for the alleged loss of hunting and fishing rights on their reservation in Wisconsin which they claim were abrogated and cancelled by the Menominee Termination Act of 1954, *supra*, passed by the Congress of the United States. They assert that this Act enabled the State of Wisconsin to impose its hunting, fishing, and conservation laws upon the members of the tribe living on the reservation and this has extinguished their right to hunt and fish on their land "untrammeled by any state law or regulation"; that this is a valuable property right and the Government should compensate them for its loss. They admit they have the right to hunt and fish on the reservation on the same basis as exists for any non-Indian landowner on his land, but they claim the right to be free of any state hunting and fishing laws. They say they should recover damages for the loss of this freedom.

The Government has challenged the jurisdiction of this court and contends that the Menominee Termination Act, *supra*, abolished the Menominee Tribe of Indians and that the plaintiffs are not entitled to maintain this suit in this court. We do not agree. It is clear from the wording of the various sections of the Termination Act itself that it was contemplated the Menominee tribe would continue in existence after the Act became effective. For instance, the Act provided procedure for setting up a final roll of the members of the *tribe* and after the roll was completed, certificates were to be issued by the *tribe* to the members whose names appeared on the roll. Furthermore, the in-

terest was to be alienable only in accordance with such regulations as may be adopted by the *tribe*. It provides further, that the Secretary of the Interior would transfer all tribal property to a trustee "for the benefit of the Menominee tribe." Finally, the Act states that after it becomes effective, the individual members of the *tribe* shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and all statutes of the United States applicable to Indians because of their status as Indians shall no longer be applicable to the members of the *tribe* and the laws of the several states shall apply to the *tribe* and its members and that nothing in the Act shall affect the status of the members of the *tribe* as citizens of the United States. The Termination Act did not abolish the *tribe* or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the tribe. The Menominee Indians continue to constitute a tribe whose membership is composed of those persons whose names appear on the official roll of the tribe prepared in accordance with the terms of the Termination Act. The tribe continues to hold the beneficial and equitable interest in the property that was conveyed by the Secretary of Interior to plaintiffs, Menominee Enterprises, Inc., and First Wisconsin Trust Company, Trustees, in trust for the tribe. Certainly the Menominees constitute a "tribe, band, or other identifiable group of American Indians" within the meaning of the Indian Claims Commission Act of 1946, as amended, 28 U.S.C. § 1505 (1964), and they are asserting a claim in this case arising under the Treaty of 1854, *infra*, and the Termination Act, *supra*. Consequently, this court has jurisdiction of this case under the Indian Claims Commission Act, *supra*, and under the Tucker Act, 28 U.S.C. § 1491 (1964).

I

The Menominee Indians have lived as a tribe since time immemorial in Wisconsin. They have made various treaties with the United States through the years, most of which have nothing to do with the present lawsuit. However, by way of background, we will point out that by the Treaty of St. Louis, 7 Stat. 153 (1817), they acknowledged themselves to be under the protection of the United States. The Treaties of Prairie des Chiens, 7 Stat. 272 (1825), and Butte des Morts, 7 Stat. 303 (1827), settled certain boundary questions, while by the Treaty of Washington, 7 Stat. 342 (1831), and 7 Stat. 405 (1832) they ceded 3 million acres to our Government. They ceded about 4,184,000 acres to the United States by the Treaty of Cedar Point, 7 Stat. 506 (1836), and in 1848, ceded the balance of their land of approximately 4 million acres by the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952, in exchange for about 600,000 acres west of the Mississippi River.

As a part of this last treaty and exchange, it was agreed that they could inspect the land west of the Mississippi before moving on it. They did so and reported dissatisfaction with it and refused to move to it. The Government then ceded them 276,480 acres of different land on Wolf River in Wisconsin which was acceptable to them and to which they moved in 1852.

In order to legalize this exchange of land, the Treaty of 1848 was amended by the Treaty of Wolf River, 10 Stat. 1064, 1065 (1854), by which the Menominees ceded back to the Government the lands west of the Mississippi which they had refused to accept and in return the Government gave to them the reservation on Wolf River "for a home, to be held as Indian lands are held, * * *." No mention was made in this treaty or in the Treaty of 1848 about hunting or fishing rights.

Except for two small tracts ceded by the Menominees in 1856, for use by the New York Indians, 11 Stat. 679, the Wolf River Reservation of about 230,000 acres has remained intact as the Menomineee Reservation to the present time. It was occupied and governed by them according to the customs, laws, rules and regulation of the tribe without any outside interference by the state or anyone else during the 100 years from 1854 to 1954. This freedom from outside regulation and interference during this period extended to and included their hunting and fishing on the reservation, which was controlled only by the rules and regulation of the tribe itself.

II

We will consider first whether or not the Menominees had exclusive and unregulated hunting and fishing rights on their Wolf River Reservation. While it may be that the Menominees could establish a claim to such hunting and fishing rights by Indian title acquired by their ancestors through use and occupancy of land in Wisconsin for a long time, which may have included the land in their present reservation, these facts are not before us and we cannot speculate with reference to them. Actually, it is not necessary for us to pass upon any aboriginal claim to hunting and fishing rights, because the Menominees do not contend that their rights in this case are based on aboriginal title at all. Rather, they pitch their claim squarely on the hunting and fishing rights which they assert were given to them by the Government in the Treaty of Wolf River in 1854, *supra*.

That Treaty, which created their present reservation, did not specifically or expressly mention hunting and fishing rights. Article 2 of the treaty (10 Stat. 1065) provided:

> In consideration of the foregoing cession the United States agree to give, and do hereby give, to

> said Indians for a home, to be held as Indian lands are held, [the land in question] * * *.

The Menominees say that the language "to be held as Indian lands are held" grants them an unqualified right to hunt and fish on the reservation in their own way free from all outside regulation or control. We think they are right. *Cf. Oneida Tribe* v. *United States*, 165 Ct. Cl. 487, 490-91 (1964), *cert. denied*, 379 U.S. 946. *Moore* v. *United States*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827. The primary reason they accepted this reservation as their new home was that it was filled with all kinds of game. We so held in the case of *Menominee Tribe of Indians* v. *United States*, 95 Ct. Cl. 232, 240-41 (1941), where we said:

> The basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirious of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game. * * *
>
> * * * part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty was the fact that the tract in question contained swamp lands which were suitable for hunting.

It should be remembered that at the time of the treaty in 1854, hunting and fishing was a way of life with the Menominees. They depended on it for their livelihood if not their very existence. It is inconceivable that a reservation would have been created for them at that time without giving them the exclusive right to hunt and fish. The Supreme Court in discussing fishing rights of Indians in the case of *United States* v. *Winans*, 198 U.S. 371, 381 (1905), stated that such rights are "not much less necessary to the existence of the Indians than the atmosphere they breathed." The same observation applies to their

hunting rights. See *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918).

The Supreme Court of Wisconsin in passing on the identical question before us in *Wisconsin* v. *Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41, 44 (1963), *cert. denied*, 377 U.S. 991 (1964), *rehearing denied*, 379 U.S. 871, said that if the 1854 treaty provision which ceded these lands to the Menominees "to be held as Indians lands are held" was ambiguous as to whether or not it included hunting and fishing rights, it should be interpreted in favor of the Indians, citing *Winters* v. *United States*, 207 U.S. 564, 576-77 (1908). The court went on to say in the *Sanapaw* case:

> * * * Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty. *Ibid.*

We agree with the Supreme Court of Wisconsin that the 1854 treaty did grant exclusive hunting and fishing rights to the Menominees on their reservation free from the state's game laws. Furthermore, they enjoyed these exclusive rights for 100 years with the consent and acquiescence of the State of Wisconsin. We are supported in our decision by the cases of *Klamath & Modoc Tribes* v. *Maison*, 139 F. Supp. 634 (D. Ore. 1956), *Klamath & Modoc Tribes* v. *Maison*, (unreported, United States District Court for the District of Oregon, No. 8081 (1963)), and *Oregon* v. *Pearson* (unreported, District Court of Klamath County, Oregon, No. 61-792c (1961). In those cases the treaty between the Government and the Klamath and Modoc Tribes and the Yahooskin Band of Snakes in 1864, did not mention hunting or trapping

rights on their reservation, but the courts held that the treaty granted them such rights by implication and that the Indians could hunt and trap on their reservation without restriction or control by the State of Oregon.

III

We come now to the consideration of whether or not the Menominee Termination Act of 1954, *supra*, abrogated or cancelled the hunting and fishing rights of the Menominees on their reservation and thereby subjected them to the game laws of the State of Wisconsin on the same basis as if they were non-Indian citizens of the state. The Act did not mention hunting and fishing rights, but the Menominees point out that the Supreme Court of Wisconsin held in the case of *Wisconsin* v. *Sanapaw*, *supra*, that the following language in the Act cut off their unregulated hunting and fishing rights and made them subject to the game laws of Wisconsin:

> SEC. 10. * * * all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.* [Emphasis supplied.] 68 Stat. 252, 25 U.S.C. § 899 (1964).

Since there was no mention of hunting and fishing rights in the Act either by way of preservation or abrogation, we must look to the legislative history of the Act and to all of the facts and circumstances existing at the time of its passage, as well as at the time it was implemented and became effective, to determine if it cut off these rights by implication. *Offutt Housing Co.* v. *Sarpy County*, 351 U.S. 253, 260 (1956).

The right to hunt and fish Indian fashion is a valuable property right. See *United States* v. *Winans*, *supra*; *The*

Tlingit and Haida Indians of Alaska v. *United States*, 147 Ct. Cl. 315, 177 F. Supp. 452 (1959). It should not be taken away by implication unless there is some cogent or compelling reason for doing so. This is in accord with the settled rule that repeals by implication are not favored and will not be held to have taken place if there is a reasonable construction, by which both the treaty and the statute can coexist consistently with the intention of Congress. *Ward* v. *Race Horse*, 163 U.S. 504, 511 (1896); *United States* v. *Zacks*, 375 U.S. 59, 67 (1963). See *United States* v. *Moore*, 62 F. Supp. 660, 667 (W. D. Wash. 1945), *aff'd.* 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947).

Turning to the legislative history, we find that the bill which was finally passed as the Termination Act, originated in the House of Representatives of the 83d Congress as H.R. 2828. There were two other bills, S. 2813 and H.R. 7135, on the same subject pending before the Congress at the same time. Both S. 2813 and H.R. 7135 provided for the preservation of the hunting and fishing rights the Menominees might have by treaty, statute, custom or judicial decision. H.R. 2828 was silent on the subject. At the hearings on the bills, two witnesses expressed their opinion that H.R. 2828 would not affect hunting and fishing rights acquired by *treaty* but would repeal such rights granted by *statute*. A third witness stated that he thought the bill by its silence would by implication abolish the tribal rights to exclusive hunting and fishing within the reservation.[1] The Congress enacted H.R. 2828 into law without any provision as to hunting and fishing rights. It is argued that Congress thus made a choice and cut off the exclusive hunting and fishing rights by implication. We do not agree.

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[1] *Joint Hearings Before the Subcommittees of the Committees on further and Insular Affairs on S. 2813, H.R. 2828, and H.R. 7135*, 83d Cong., 2d Sess., pt. 6, at 588, 629, 697 (1954).

There was no need for the Congress to provide for the preservation of the hunting and fishing rights in the Termination Act for at least two reasons. In the first place, they were preserved and protected for the Menominees by another bill that was passed by the same 83d Congress and considered by the same committees of both houses. It was passed as an amendment to Public Law, 280, 18 U.S.C. § 1162 (1964), on August 24, 1954, only about two months after the Termination Act was passed on June 17, 1954, but over six years before the Termination Act became effective on April 30, 1961. Public Law 280 dealt with the extension of criminal jurisdiction of the State of Wisconsin over the Menominee Reservation and expressly reserved and protected the hunting and fishing rights of the Menominees in the following language:

> § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country.
>
> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
>
> | State or Territory of | Indian country affected |
> |---|---|
> | * * * * | |
> | Wisconsin | All Indian country with the State. |
>
> (b) *Nothing in this section* shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is

> subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or *shall deprieve any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.* [Emphasis supplied.]

* * * * *

It is logical to assume that the Congress, acting through its committees that handled both bills, as well as by its own action as a whole, knew that hunting and fishing rights were being protected in Public Law 280 and there was no need to mention them in the Termination Act.[2]

Also, it should be pointed out that H.R. 7135 and S. 2813, which were the other two bills considered by Congress when H.R. 2828 (The Termination Act) was also considered, contained language practically identical to the language in Public Law 280 with reference to hunting and fishing rights. For instance, they both provided:

> SEC. 15. Nothing contained in this Act shall deprive the tribe or its members of any rights, privileges, or immunity afforded by treaty, statute, custom, or judicial decision, to fish, hunt, trap, and harvest the products of nature or the control, licensing, or regulation thereof, except as may be agreed upon from time to time by the tribe and the State of

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[2] It should be noted that the bill (H.R. 1063) which became Public Law 280 was introduced on January 6, 1953, and was passed on August 15, 1953. On February 9, 1953, approximately one month after the introduction of H.R. 1063, the bill (H.R. 2828) which was to ultimately become the Menominee Termination Act was introduced. It was passed on June 17, 1954. The Menominee Reservation was added to those lands subject to Public Law 280 pursuant to the amendment of August 24, 1954.

> Wisconsin; * * *. *Joint Hearings Before the Subcommittees of the Committees on Interior and Insular Affairs on S. 2813, H.R. 2828, and H.R. 7135*, 83d Cong., 2d Sess., pt. 6, at 581, 583 (1954).

Obviously, there was no need to protect the hunting and fishing rights in both the Termination Act and in Public Law 280 with almost the same phraseology. So, H.R. 2828 (The Termination Act) was passed without mention of such rights. But they were preserved in the Menominee Amendment to Public Law 280, which became law in 1954, almost seven years before the Termination Act became effective in 1961.

In the second place, it was unnecessary to preserve the hunting and fishing rights in the Termination Act because by the terms of the Act it was provided that the tribe would submit a plan to the Secretary of the Interior which:

> SEC. 7. * * * shall contain provision for protection of the forest on a sustained yield basis, and for the protection of the water, soil, fish and wildlife. 70 Stat. 549, 25 U.S.C. § 896 (1964).

The Act provided further that upon the submission of such a plan by the tribe and its approval by the Secretary of the Interior, he would issue a proclamation containing the plan and his approval thereof. The Termination Act would become effective upon the issuance and publication of the proclamation.

In due time, the tribe did submit such a plan to the Secretary of the Interior. It included a provision on law and order (which would include hunting and fishing) in the following language:

> It is unnecessary, aside from amendment of Wisconsin laws to accord with existing judicial machinery, to provide specific plans for future handling of law and order, federal jurisdiction over the Menomi-

> nee Reservation having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U.S.C. 1162).[3]

By this language, the tribe referred to Public Law 280 and in effect made it a part of its plan by reference, thereby protecting and preserving its hunting and fishing rights in great detail. It is pertinent to observe at this point that the amendment to Public Law 280, which was to incorporate the Menominee Reservation within its provisions, was introduced at the request of the Menominee Indians. At the time Public Law 280 was enacted, the tribe had requested exemption because they felt their tribal law was sufficient. The tribe thereafter reconsidered its position and authorized its attorneys and its tribal delegates to seek the amendment referred to in April 1954, prior to passage of the Termination Act. The amendment was to "carry out the wishes of the tribe." S. REP. No. 2223, *United States Code Congressional and Administrative News*, 83d Cong., 2d Sess. 3171-72 (1954).

Certainly the Menominee Tribe did not feel that the Termination Act divested them of their unrestricted right to hunt and fish. Furthermore, in seeking the amendment which would extend the criminal jurisdiction of Wisconsin over the Menominee Reservation, excluding the regulation of hunting and fishing rights granted by treaty, it cannot be said that a sacrifice of these rights was at all contemplated. The plan was approved and the Proclamation was issued by the Secretary of the Interior, thereby making the Termination Act effective on the 30th day of April 1961. By this procedure, the provisions of Public Law 280 that preserved the hunting and fishing rights of the Menominees were included in and made a part of the Termination Act of 1954 by reference. This leads us to the inescapable conclusion that the Termination Act not only did not abrogate the exclusive hunting and fishing

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[3] 26 Fed. Reg. 3726, 3728 (1961).

rights of the Menominees on their own reservation, but actually preserved and protected them. Further supporting this view is the observation that a plan calling for the protection of fish and wildlife would hardly be necessary if state laws were to govern in those areas. See S. REP. No. 2412, 84th Cong., 2d Sess. 2 (1956), in which it is indicated that the Menominees would have no trouble formulating such a plan.

IV

We are mindful that this conclusion is different from the result reached by the majority of the Supreme Court of Wisconsin on the same question in the case of *Wisconsin* v. *Sanapaw*, *supra*, but it is in accord with the result of the dissenting opinion. In that case three Menominee Indians were charged in criminal complaints in the same case with hunting deer with the aid of an artificial light and with the transportation of a loaded and uncased gun in an automobile on the Menominee Reservation in violation of the game laws of the State of Wisconsin. The defendants pleaded not guilty but admitted, and the court found, that the alleged violations were, in fact, committed. The trial court, however, in an unreported written opinion found the defendants not guilty because they were enrolled members of the Menominee Indian tribe and the state had no jurisdiction to enforce its hunting and fishing regulations against them on the Menominee Reservation. It based its decision on the fact that the Treaty of 1854 granted the Menominee Indians the right to hunt and fish on their reservation free from regulation of the state game laws and that this right had been enjoyed by the Indians for over 100 years and that the Termination Act, *supra*, did not terminate such exclusive hunting and fishing rights. The state appealed the case to the Supreme Court of Wisconsin where the majority of the court reversed the decision of the trial court and held that the Menominee Termination Act abrogated the tribe's right

to be free of the state's game laws in hunting and fishing on its reservation. The case was remanded to the trial court for further proceedings in accordance with the opinion. The court based its decision solely on its interpretation of the words and language of the Act itself. While we think an opposite interpretation of the Act should be made, still, out of deference and respect for the Wisconsin Supreme Court, we will say that if that court could have had the benefit of all the facts and circumstances surrounding the contemporaneous consideration of Public Law 280, by the same Congress that passed the Termination Act, including the plan of the tribe incorporating a portion of Public Law 280 therein, and its approval by the Secretary of the Interior, in effect making such provisions of Public Law 280 a part of the Termination Act, the decision of that court might well have been different.

Our view is supported by the two decisions in *Klamath & Modoc Tribes* v. *Maison, supra*, and the case of *Oregon* v. *Pearson, supra*. In those cases, which we will refer to as the *Klamath* cases, the tribes had exclusive fishing rights on their reservation which were granted to them by the Treaty of October 14, 1864, 16 Stat. 707, 708 in connection with the creation of their reservation. The treaty provided:

> * * * and the exclusive right of taking fish in the streams and lakes, included in said reservation, * * * is hereby secured to the Indians aforesaid: * * *

Nothing was said in the treaty about hunting or trapping. On August 13, 1954, Congress passed the Klamath Termination Act, 68 Stat. 718, 25 U.S.C. § § 564-64x (1964), which provided:

> SEC. 14. * * *
>
> (b) Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty. *Id.* at 722.

Here again, nothing was said about hunting or trapping. However, it should be noted that this Termination Act contained the same general language as is contained in the Menominee Termination Act, which the Supreme Court of Wisconsin said in the *Sanapaw* case cut off the hunting and fishing rights of the Menominees, as follows:

> SEC. 18. * * * all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.* [Emphasis supplied.] 68 Stat. 722, 25 U.S.C. § 564q (1964).

In the *Klamath* cases certain Indians were charged with illegally hunting and trapping wild game on their reservation, contrary to the game laws of Oregon. This occurred after the Klamath Termination Act was passed. The same argument was made there (as here) that since there was no mention of hunting or trapping in either the treaty or the Termination Act, such rights, if they ever existed, were cut off by the Termination Act. It was argued that this was especially true since fishing rights were expressly preserved and that if Congress had intended to preserve hunting and trapping rights it would have said so in the Termination Act. But the courts in those cases disagreed with this argument and held that the Termination Act did not cut off the hunting and trapping rights of the tribe. They also held that such rights were specifically recognized by Congress in Public Law 280, and that the members of the tribe had a right to hunt and trap on the reservation without restrictions or control by the State of Oregon.

In the only reported case of the three referred to *infra*, the court concluded as follows:

* * * *

2. Public Law 280, 83d Cong., 67 Stat. 588, 18 U.S.C. § 1162, * * * did not extend the hunting and trapping laws of the State of Oregon to the Klamath Indian Reservation. *Klamath & Modoc Tribes* v. *Maison, supra* at 637.

While the effect of Public Law 280 was specifically mentioned in *Klamath & Modoc Tribes* v. *Maison*, 139 F. Supp. 634 (D. Ore. 1956), no reference to the Klamath Termination Act was made. However, in the unreported *Klamath* case, dated December 10, 1963, the court retained jurisdiction over its previous decision rendered in 1956, and made reference to the Klamath Termination Act by stating that the remaining enrolled members of the tribe, pursuant to treaty, had the unrestricted right to hunt and trap upon their lands. It further expressed the view that withdrawn members of the tribe who continued to be members for purposes of tribal claims against the United States, pursuant to the Klamath Termination Act, had no such privileges. Thus, we have an implicit recognition that the remaining enrolled members of the tribe, subsequent to the effective date of the Klamath Termination Act, retained their right to hunt and trap upon their lands without restriction or control by the state. Furthermore, in *Oregon* v. *Pearson, supra*, the court expressly held that since the Klamath Termination Act did not specifically grant away the hunting and trapping rights, they were retained by the enrolled members without restriction by the State of Oregon.

These conclusions were supported by the Department of the Interior, acting through Glenn F. Emmons, Commissioner of the Bureau of Indian Affairs, when the Commissiner issued a memorandum dated July 2, 1956, on the subject of "Policy of the Bureau respecting the protection and preservation of Indian hunting and fishing rights in termination legislation." This memorandum states:

* * * *

> Following the policy laid down by the Congress in the enactmeint of the act of August 15, 1953 (67 Stat. 588; Public Law 280, 83d Cong.), the Bureau's policy will be to protect and preserve any right, privilege or immunity with respect to hunting, trapping or fishing afforded to any Indian or Indian group by Federal treaty, agreement or statute in the planning and execution of readjustment programs, including the seeking of legislation necessary to carry out such programs.
>
> Section 2 of the act of August 15, 1953, *supra*, states the policy of the Congress concerning the protection and preservation of Indian hunting and fishing rights. It provides that nothing in the act shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under Federal treaty, agreement or statute with respect to hunting, trapping or fishing or the control, licensing or regulation thereof.
>
> * * * *

The memorandum then mentioned the decision in *Klamath & Modoc Tribes* v. *Maison*, *supra*, with approval by stating that it would follow the interpretation of Public Law 280 as made by that case unless changed by other court decisions, saying:

> It thus appears, from the only judicial interpretation of the act which has been made, that the intention of Congress was to preserve and protect both express and implied rights, privileges and immunities afforded under Federal treaties, agreements, or statutes with respects [sic] to hunting, trapping and fishing. This Bureau will accept the interpretation of the statute as made by the courts and lend such assistance as is possible in preserving and protecting hunting and fishing rights of the Indians.
>
> * * * *

It thus appears that the Commissioner fully understood and agreed that Public Law 280 preserved and protected

hunting and fishing rights of Indians who were the subject of Termination Acts, such as the Menominees.

The question before us seems to have been laid to rest by the Supreme Court in the case of *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45 (1962). In that case, Congress authorized the Secretary of the Interior in 1891, to prescribe rules and regulations governing the Metlakatla Reservation in Alaska. Acting under this authority, the Secretary issued regulations in 1951, allowing the Metlakatlas to use fish traps in the waters around their reservation. After Alaska became a state, it passed an anti-fish-trap law in 1959, and sought to enforce it against the Metlakatlas as to the waters surrounding their reservation. Mr. Justice Frankfurter, in speaking for the Supreme Court decided the case adversely to the state on the basis of Public Law 280 by saying:

> In 1958, 72 Stat. 545, Alaska was added to the list of States and Territories permitted to exercise civil and criminal jurisdiction over Indian reservations. The State has not argued that this took away the power of the Secretary of the Interor to make regulations contrary to state law. Appellant has argued, to the contrary, that the statute expressly preserved Indian fishing rights from state laws. The statute granting States civil and criminal jurisdiction was passed in 1953, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360. Subsection (b) of 18 U.S.C. § 1162 provides that nothing therein shall authorize alienation, encumbrance, or taxation of Indian property, "or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

> *This statute expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, but only those fishing rights and privileges given by federal treaty, agreement, or statute.* [Emphasis supplied.] *Id.* at 56.

Of course, fishing rights were emphasized in that case, but, obviously, if hunting or trapping right had been involved, the same result would have been reached as to them, since they are all treated together in Public Law 280. The Supreme Court upheld the right of the Metlakatlas to use fish traps in the waters around their reservation free from any interference by the fish-trap laws of the State of Alaska, thereby extending the protection of Public Law 280 to "regulations", in addition to "treaty, agreement or statute," although regulations are not mentioned in the statute.

When applied to the case before us, the holding of the Supreme Court in the *Metlakatla* case as quoted above, "This statute [Public Law 280] expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, * * *," clearly recognizes and establishes the right of the Menominees to hunt and fish and trap on their reservation free from interference by the game laws of the State of Wisconsin.

V

If the rights of the Menominees to hunt and fish on their reservation free from regulation by the state's game laws have been interfered with, it is due to the action of the State of Wisconsin acting through its Supreme Court and law enforcement officers and not because of any act of the United States. Consequently, any complaint they have on that score should be against the State of Wisconsin and not against the Federal Government. In extending the jurisdiction of its game laws over the Menominee

Reservation, Wisconsin was acting as a sovereign state wholly independent of any authority granted to it in this respect by the United States. In so doing, it was not an agent of the Federal Government and the Government is neither responsible nor liable for its improper acts. *Cf. D. R. Smalley & Sons* v. *United States*, Ct. Cl. No. 422-65, decided February 17, 1967.

It may be argued that the conflict between our holding in this case and the decision of the Supreme Court of Wisconsin in the *Sanapaw* case, *supra*, leaves the Menominee Indians in an impossible position. This does not necessarily follow. They have the same remedy, among others, that the Quillayute Tribe of Indians had in the case of *United States* v. *Moore*, 62 F. Supp. 660 (W.D. Wash. 1945), *aff'd*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947). There, an injunction suit was filed by the United States on behalf of the tribe to restrain state conservation officers, namely the Directors of Game and of Fisheries of the State of Washington, from enforcing the state's game laws on the Quillayute Indian Reservation. The trial court granted the injunction and decreed that the defendants were "permanently enjoined, restrained, and debarred from interfering in any manner with or asserting any jurisdiction or control whatsoever over fishing activities" of the tribal members on their reservation. *Id.* at 761.

On appeal the court held that in the creation of the reservation "sufficient for their [the Indians] wants" the United States preserved the area in controversy for the exclusive use of the Indians and it was not subject to the fish and game laws of the state. *Id.* at 763-64.

VI

In summary, we hold: (1) the Treaty of Wolf River in 1854 granted exclusive hunting and fishing rights to the Menominees on their reservation free from outside regu-

lation; (2) the Menominee Termination Act of 1954 did not abrogate or cut off such hunting and fishing rights, and even though the Supreme Court of Wisconsin erroneously, in our opinion, construed the Act to terminate such rights, this does not create liability against the United States; (3) the Menominees, therefore, who are enrolled as members of the tribe on its records in accordance with the Termination Act, have, own and possess at the present time the exclusive right to hunt and fish on their reservation free from restriction, regulation, or control by the State of Wisconsin; and (4) the petition of the Menominees, having failed to state a cause of action against the United States, is hereby dismissed.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

DURFEE, *Judge*, dissenting:

In *Wisconsin* v. *Sanapaw et al.* 21 Wis. 2d 377, 124 N.W. 2d 41 (1963), *cert. denied*, 377 U.S. 991 (1964), *rehearing denied*, 379 U.S. 871 (1964), the Wisconsin Supreme Court held that Congress by its enactment of Section 10 of the Menominee Termination Act of 1954 ended plaintiff's unregulated hunting and fishing and brought them within the purview of the state's game laws. See 68 Stat. 250, 25 U.S.C. § 899 (1964). The state court found that the state's asserted regulation of the Indians was derivative of Federal statutes and that the Indians had no claim against the state. The majority of our court new recides the reverse; that is, that the Termination Act "did not abrogate the exclusive hunting and fishing rights of the Menominees on their own reservation, but actually preserved and protected them." The court means that any future complaint by the Indians for violation of their hunting and fishing rights is against the State of Wisconsin and not the Federal government. Each court has told the Indians that they have rights, but not in

the deciding court. Thus, the Indians have won both contests, but each time on the wrong playing field and against the wrong opposition.

This court's decision leaves plaintiffs in a state of legal weightlessness. While each court has held that the other court's government is responsible for plaintiffs' condition, neither is able to enforce its finding. The Wisconsin Supreme Court cannot make the Federal government compensate the Indians. And this court is unable to stop Wisconsin's enforcement of state game laws, even though we say the Indians are not subject thereto. Thus, if there is no appeal of this court's decision, plaintiffs may never have their dilemma effectively resolved. Their situation will not be the common one of the party who finds himself with conflicting decisions in several Federal circuit courts. Rather it will be akin to the situation of Alphonse and Gaston where two courts tell each other that any further resolution of the dilemma belongs to the other's docket. The result is that neither court takes further action, and the Menominee Indian who tries to exercise his ancient hunting and fishing rights on his own reservation winds up in jail.

The predicament of plaintiffs does not have to remain insolvable. The majority opinion presents one solution. It recommends that plaintiffs seek, in a Federal district court, an injunction against the State of Wisconsin preventing it from inforcing its game laws. This suggestion is fraught with drawbacks; the most minor one being the possibility that the injunction will not be granted. Of major consequence are the difficulties connected with Federal action against state officials in the functioning of their duties. It sufficies to say that the problems arising out of *Ex Parte Young* 209 U.S. 123 (1908) and its progeny make me very chary of Federal injunctions issued against state functions. See, generally, Hart & Wechsler, *The Federal Courts and the Federal System* 814-890;

Developments in the Law—Injunctions 78 Harv. L. Rev. 994, 1045 (1965); Wright, *Federal Courts*, 348. Cf. *Martin* v. *Creasy*, 360 U.S. 219 (1959).[1]

A more obvious solution to plaintiffs' difficulties would be a grant of certiorari by the Supreme Court and a resolution of the conflict between the state and Federal courts' decisions. However, the United States Supreme Court has already denied certiorari in the Wisconsin Supreme Court Indian case, and in the *Klamath Indian* case cited by the majority herein to the same effect as our present opinion.

In situations like this, at least two other approaches—comity and certification—are available to assist in resolving the Indians' predicament. These legal vehicles contain a greater degree of certainty than either certiorari or injunction. For, with them, the resolution of the conflict between the courts is not left to a later court's acts, but is handled while the case is still within this court's jurisdiction. Even though the conflict between the courts would be resolved in this court, neither of the two additional approaches require as thorough handling of the merits of the case as the majority does. Thus by doing less in the handling of the case, this court could do more to resolve plaintiffs' situation.

The first of these approaches—comity—would mean the acceptance by this court of the decision of the Wisconsin Supreme Court. Acceptance of the state court's decision does not mean that the process is automatic, that there is no inspection of either the present case or the state's

[1] The problems in this area were passed over without comment by the court in *United States* v. *Moore*, 62 F. Supp. 660 (W.D. Wash. 1945); *aff'd.* 157 F. 2d 760 (9 Cir. 1946); *cert. denied*, 330 U.S. 827 (1947, the case cited by the majority to support the suggestion of an injunction. In that case, plaintiff requested an injunction. After holding for plaintiff on the law, the court decided that it should grant plaintiff's request.

decision. That approach would relegate the court to being a mere rubber stamp or a judicial conduit. Not only would that possibility saddle the court with an unsound decision, but also it would mean an abdication of duty. In this case, the thought of comity should not arise until one believes that he is not without doubt on the question of whether or not the Menominee Termination Act cancelled hunting and fishing rights of the Indians. The next step is to inspect the state court decision to see if it is reasonably derived. With a positive answer to this inspection, one would use comity and leave the final resolution to a higher court. *Mast, Foos & Company* v. *Stover Manufacturing Company*, 177 U.S. 485, 488-89 (1900); *Sanitary Refrigerator Company* v. *Winters, et al.* 280 U.S. 30, 35 (1929).

The second approach available to courts whose resolution of an issue is not fixed is the seldom used process of certification. Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 Va. L. Rev. 1, 46-50 (1949). 28 U.S.C. § 1255 (2) provides that "[c]ases in the Court of Claims may be reviewed by the Supreme Court * * * [b]y certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon certification the Supreme Court may give binding instruction on such question." The sporadic use of certification is not due to its lack of success. For, when used, it has been benefically employed. See *Williams* v. *United States*, 289 U.S. 553 (1933) and *O'Donoghue* v. *United States*, 289 U.S. 516 (1933) (both certifications from the Court of Claims). Use of certification in this case should not augment the fears held by many that an extensive use of this right could unduly enlarge the Supreme Court's obligatory jurisdiction. This is not the case where a court is trying to conceal an obligatory appeal in another guise. There is no wolf in sheep's clothing. Certification is put forth

so that this court could make every possible effort to arrive at a sound adjudication of a case that presents a troubling issue of law augmented by the possibility of a never-solved conflict between Federal and state courts that would deprive plaintiffs of a final, meaningful resolution of their suit. The Menominees are either entitled to their hunting and fishing rights under the Treaty or they are entitled to damages because these rights have been taken away, and certification would guarantee one of these decisions and not a meaningless hybrid.

Between comity and certification, I favor the latter approach because it seeks guidance from a higher court rather than looks backwards to a lower court as comity does. Therefore, rather than reach a decision on the merits of the case at this time, I would have certified the following question to the Supreme Court: Did the Menominee Termination Act of 1954 cancel the hunting and fishing rights of plantiffs on their reservation and thereby subject them to the game laws of the State of Wisconsin as if they were non-Indian citizens of the state?

The history of the Menominee Tribe does not read well for the conduct of the United States. Again and again the Tribe has had to sue the Federal government in this court to recover damages to which they were entitled. Recently, a committee of the Congress referred to this court as "the keeper of the nation's conscience." If the court is to continue to deserve this title, we must now see to it that before the Federal government finally closes its books on the old Menominee Tribe, the last page is written with honest justice for them and for their rights.

LARAMORE and COLLINS, *Judges*, join in the foregoing dissent.

APPENDIX C

TREATY OF MAY 12, 1854 (10 Stat. 1064)

Articles of agreement made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hunderd and fifty-four, between the United States of America, by Francis Huebschmann, superintendent of Indian affairs, duly authorized thereto, and the Menominee tribe of Indians, by the chiefs, headmen, and warriors of said tribe—such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight.

Whereas, among other provisions contained in the treaty in the caption mentioned, it is stipulated that for and in consideration of all the lands owned by the Menominees, in the State of Wisconsin, wherever situated, the United States should give them all that country or tract of land ceded by the Chippewa Indians of the Mississippi and Lake Superior, in the treaty of the second of August, eighteen hundred and forty-seven, and by the Pillager band of Chippewa Indians in the treaty of the twenty-first of August, eighteen hundred and forty-seven, which had not been assigned to the Winnebagoes, guaranteed not to contain less than six hundred thousand acres; . . .

And whereas, upon manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River, upon Crow Wing, which had been assigned them, and a desire to remain in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto Rivers.

Now, therefore, to render practicable and stipulated payments herein recited, and to make exchange of the lands given west of the Mississippi for those desired by

the tribe, and for the purpose of giving them the same for a permanent home, these articles are entered into.

ARTICLE 1. The said Menominee tribe agree to cede, and do hereby cede, sell, and relinquish to the United States, all the lands assigned to them under the treaty of the eighteenth of October, eighteen hundred and forty-eight.

ARTICLE 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north of range 16 east of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being township 28, 29, and 30, of ranges 13, 14, 15, and 16, according to the public surveys.

* * * *

In testimony whereof, the said Francis Huebschmann, superintendent as aforesaid, and the chiefs, headmen and warriors of the said Menominee tribe, have hereunto set their hands and seals, at the place and on the day and year aforesaid.

Francis Huebschmann, [L. S.]
Superintendent of Indian affairs.

APPENDIX D

MENOMINEE TERMINATION ACT OF 1954, AS AMENDED (25 U.S.C. §§ 891-902)

§ 891. Purpose

The purpose of sections 891-902 of this title is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin.

* * * *

§ 893. Membership roll; closure; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: . . . When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe.

* * * *

§ 896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. . . . The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. . . .

§ 897. Transfer of property

On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of this title, the title to all property, real and personal, held in trust by the United States for the tribe. . . .

§ 899. Publication of proclamation of transfer of property; termination of Federal services; application of Federal and State laws; citizenship status unaffected

When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of the status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in sections 891-902 of this title shall affect the status of the members of the tribe as citizens of the United States. . . .

* * * *

APPENDIX E

DECISION OF THE SHAWANO-MENOMINEE COUNTY COURT, BRANCH NO. 2, MENOMINEE COUNTY DIVISION

November 1, 1962

The issues of this case are very clearly drawn. It is the contention of the state as outlined in the opinion of the Attorney General and oral argument by District Attorney Fritz Eberlein of Shawano-Menominee County,

(1) That the right of hunting and fishing were not granted and not included in the treaties of 1854 and 1856.

(2) That Congress has plenary powers to deal with the Indians and may abrogate Indian privileges and rights, including treaty rights, by statute. Further that the lands here involved are part of the public domain.

(3) That Public Law 399 and supplementary acts terminate the hunting and fishing privileges heretofore enjoyed by Menominee Indians within what was formerly the Menominee Indian Reservation, now Menominee County.

The defense contends,

(1) That the treaty of 1854 provides that the lands are to be held as Indian lands are held.

(2) That the treaty was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.

(3) That the termination act (assuming that Congress had the right to terminate hunting and fishing privileges) did not by its terms so provide. That the tribe according to the act still exists as such and likewise all lands and property of the tribe is now held by the enrolled members

of the tribe as the only stockholders of the Menominee Enterprises, Incorporated, who according to the act were the designated recipients by the tribe. That the members of the tribe have the right to quietly enjoy hunting and fishing and dwelling thereon free from molestation from the United States and it follows that the State of Wisconsin lacks jurisdiction to enforce the hunting and fishing laws in Menominee County.

The briefs and opinion submitted are exhaustive and complete as to adjudication of somewhat similar issues in both federal and some state courts. The facts of this case present issues not definitely passed on by our courts.

The court is of the opinion that it is apropos to the issues herein to discuss the historic background.

It seems that all lands on this planet suitable for habitation and survival was occupied by certain ethnic groups. Curiosity and a means of travel resulted in what history has called discovery of new continents. If the Indians of North America had landed in Europe it no doubt would have been called an invasion. Columbus in a rather touching ceremony took possession of some islands in the West Indies for Queen Isabell of Spain. Some gold was brought back to Spain and then the disease of discovery spread. France got into Canada and the Northwest Territory and later what was called the Louisiana Purchase. Spain took possession of Cuba and various areas in South America and what is now known as Florida. England staked out claims on the North American continent from Maine to Florida. The Dutch obtained a rather uncertain rights in New York and made history by purchasing Manhatten Island for the sum of $24. At the times of the various nations above referred to attempted to take possession and colonize their respective areas of the North America continent and subsequent thereto it was apparent that practically the entire North American continent was occupied by aborigines, later called Indians. It is true that the

population and occupancy of the continent was not dense, but the fact did remain that there was a consistent occupation of all areas; that there were areas between the varying tribes, and there were many of different size and numbers, which area was more or less fought about and disputed by the Indians for hunting and fishing grounds, but that the pattern of occupancy was more or less consistent and that they regarded certain areas as their own private domain and at that time and subsequently thereto maintained that they had the title to said lands and the inherent right of hunting and fishing, which with some slight agriculture was their means of livelihood. The seaboard colonization proceeded rapidly until the time of the American Revolution which determined the colonies as an independent nation. Colonization and possession of lands for use of settlers proceeded systematically and fundamentally by power and strength of what we might call the colonist invaders. Firearms, of course, played a very important part. History indicates that William Penn recognized the title of the Indians and did negotiate a purchase. At this point it could be well remembered that purchasing the land from the Indians in reality meant nothing. What few dollars or goods that were paid was a poor substitute for the loss of their lands and in no way changed their method of life. It might be pointed out merely for the basis of comparison that the European countries colonizing Africa and staking out claims thereon were not as successful as in their occupancy of the North American continent, primarily perhaps because of the density of population in the African area, and we today see these countries withdrawing and leaving the title and possession of the claimed land entirely in the hands and under the control of the inhabitants of the respective areas.

After the Revolutionary War the expansion of settlers to the West, part by natural increase and others by imigration spread most rapidly west to the Mississippi River,

and we might point out that colonization or expansion by movement of settlers took possession of what lands or locations they wanted independent of claims of title thereto on the part of Indians. It was somewhat prior to 1848, which date Wisconsin was admitted to the Union, that specific issues between Indians and White settlers and the United States Government took a marked change as to rights. We are now to the point where Indians are displaying a certain type of anxiety, desire of maintenance of rights to the land so that there were issues which could no longer be passed because of the insistence on the part of the Indians and the potential threat of possible bloodshed where settlers were moving in on definitely proclaimed Indian lands.

The Memoninee Indians at this time were definitely located in Wisconsin, and from what transpired it is very apparent that the Menominee Indian chiefs fully recognized the problem and were more or less compelled to negotiate a treaty, and it must be very apparent that at this time the Menominee chiefs recognized what had transpired from the Atantic seaboard to the Mississippi River, and that unless they could negotiate some suitable agreement that they would be pushed out of the Wisconsin area, which to them was an exceptional area for wildlife, fish and fertility of soil.

History does not record the respective details of the transaction though there is enough in written nature to understand the background and motives of the bargaining that took place.

It must be remembered that the expansion from the Allegheny Mountains to the Mississippi River was fraught with many encounters, claims and counterclaims, and the occupation by might, and that the government during this time became more and more and more alert to the necessity of allocations of tribes to certain areas, and from the Indian viewpoint at the conference table it made survival

a way of life and that the area to which they were to be concentrated or moved to must be sufficiently prolific to provide for their sustenance. It is fair to assume that the treaty contracting parties were aligned, one with the background of power and force, and the other with a plea for protection from enemies and opportunity to maintain their way of life.

A treaty was drawn, and it must be remembered, also, that in the Indian's mind had been built up a picture of the great White Father at Washington who in all matters according to Indian lore and mind was the essence of fairness and right. Just what in substance was the contract or treaty between the contracting parties? On the one hand the Indians released or quit claimed or gave warranty deed according to their custom to the federal government of millions of acres of land. How much of the State of Wisconsin has not been disclosed, but it is only fair to assume that many million acres were included, for which in return they were to receive a tract of land of some six hundred thousand acres. According to records the government attempted to give them land across the Mississippi. This held up the transaction because of inspection on the part of Indians, and it was disclosed after examination that that was entirely unsuitable for Indians purposes and livelihood, and that the government agreed to protect them from their enemies and protect them in their right and claim to this land. It was theirs before the treaty but by the treaty the government guaranteed it to them as against all others and agreed to hold it in trust, they to act as guardian or trustee, the Indians to be wards of the government, the government to supervise and no doubt assist as has later proved to be the policy that must have been the outgrowth of the government's obligations under the treaty.

It is obvious that the government negotiated from a power-laden hand and if the transaction were to be re-

garded on a mutual monetary basis it would seem that the Indians were substantially short-changed. The lands that the government received was promptly a part of the public domain and was deposed by the government as such. It would appear that the land reserved which is now Menominee County never became a part of the public domain. It would, also, appear as progress and changes in life and methods of living proceeded through the years that the Indians became a problem and that the government had to assist more than was originally anticipated and that the Indian's way of life could not entirely support him and it became quite costly for the government to continue the supervision agreed upon, and now the picture has definitely changed to the point that the government acting through its Congress was hopeful to unload their responsibilities, and again at the so-called conference table Public Act 399 resulted in what may be called another treaty with the Indians. The act speaks for itself. In reading it and the foregoing resolutions before the act was passed indicate that hunting and fishing privileges and the Indian way of life were calculatingly omitted. To the Indian today it appears that the government drove a sharp bargain or was trying to enlarge the benefits for other Wisconsin citizens by permitting others to enjoy the hunting and fishing privileges. It is this point that brings to a crisis that issue.

Shortly after the 1848 period as settlers consistently and persistently moved westward across the Mississippi the Indians in the West recognized the slow and deadly push resulting in loss of hunting grounds and a forced change into a way of life that we find open rebellion, antagonism and the Indians in conflict attempting to maintain their rights and title. Teddy Roosevelt in his famous book *THE WINNING OF THE WEST* does not correctly portray the one-sided conflict in which power and the authority and the decisions of the government were maintained by force; resulting in considerable blood-

shed but with the victory on the part of the government and the Indian now trying in various areas to recoup financially what he lost territorially.

In dealing with the problem from its very origin to date it, of course, was the Congress that set the pace by legislation. Originally Indian problems were solved by treaty. As we understand a treaty it is a formal agreement between two or more nations relating to peace, alliance, trade, etc. Contract generally speaking may be broken by either party but the party so doing can naturally be held in damages that result from a breach.

Congress determined that Indian matters would be handled by acts of Congress. Future treaties were out, but existing treaties should be inviolate unless changed by mutual consent. In this way no longer were Indian tribes treated as individual nations, but rather as American subjects entirely dependent on the grace of the fairness of Congressional action. So it became a government by statute covering Indian problems. The courts seem to have sustained this view in a certain respect as some of the decisions indicate that Congress had the plenary power over Indians and Indian lands. To this court it looks as if Congress grasped the crown and maintained its position by this method of power and that all supervision, privileges, rights were entirely within the grace of Congress. If this is the correct theory and right of procedure it would seem that the only saving grace for the Menominee tribe and their reservation is that their treaty is inviolate and that their rights to the Menominee Reservation, now Menominee County, arises from said treaty and cannot be changed without their consent nor by any unilateral act of the Congress. This position the courts have approved as indicated in decisions hereinafter referred to.

The position of the state and the defense are practically at direct variance. In the supplemental opinion or

brief of the Attorney General it is seriously contended that the entire issue revolves around the fact that the Menominee Reservation prior to the treaty hereinbefore referred to was part of the public domain and that the state's position rests firmly on this ground. Let's view this position in the atmosphere and facts surrounding the treaty of the government with the Menominees. It does not specifically appear from the evidence in this case whether the Menominee Reservation so to speak was included in the grant from the tribe to the government. Nor is the court able to determine whether the state's position is that it was included in the treaty but because of the delay of two years in selecting a proper location satisfactory to the Indians that the Menominee Reservation during that interim became a part of the public domain. It appears to this court without even the slightest of doubt, first, that the title to the Reservation originally vested in the Indians and that the essence without even a serious doubt of the treaty entered into contemplated and intended that even if the lands were granted to the government the government returned them with the incident of hunting and fishing included. Any other view of what transpired is inconsistent with all the factual bargaining and understanding between the parties. It was definitely understood that the Indians were to receive the right and title in the same absolute position as they originally held it. Their way of life, hunting, fishing and limited tilling of the soil, was the entire essence of the treaty, the government guaranteeing this and, also, agreeing to protect them from enemies and to supervise them.

It would be unworthy of our government to take any other position. It must, also, be remembered that since the creation of the reservation up to the date of termination the Indians exercised the complete right of supervising their own hunting and fishing regulations without regulation or prohibition of any kind on the part

of the government. At this point we wish to point out for whatever it is reasonably worth that the Menominee lands were designated as the Menominee Indian Reservation. The very term "reservation" indicates that it was land reserved by them for their use.

The Indians never having, therefore, granted away their inherent aboriginal right of hunting and fishing therefore still possess those rights, not only up to the time of termination but as we will conclude later even after termination. Authority for this position is well-founded in the treaty itself and several decisions of both the United States and state courts. While there are many others that touch upon this right, perhaps the most important first is a provision in the Treaty of 1854. Article 2 provides as follows:

> "In consideration of the foregoing cession the United States agrees to give, and do give the said Indians for a home, to be held as Indian lands are held that tract of Country lying upon the Wolf River in the State of Wisconsin."

The 1854 treaty then designated a "reservation" for them "to be held as Indian lands are held." Thus, the Menominee Tribe has continuously exercised the exclusive and unlimited hunting and fishing rights in question. The 1854 treaty being characterized by the parties as "supplementary and amendatory to the treaty" of 1848, merges the treaty of 1848 so that there is no proper basis for saying that the tribe ever did actually lose its rights in the land ceded.

The fact that no express retention or grant of exclusive and unlimited hunting and fishing was set forth in either treaty does not alter the conclusion, this principle was well stated by the solicitor of the Department of Interior as follows.

> "The examination of various treaties between the United States and the Chippewa Indians disclosed that while the right of the Indian to hunt and to fish on ceded land was reserved in some of the earlier treaties . . . no reservation of the right to hunt and to fish was made with respect to the unceded lands of the Red Lake Reservation, but such a reservation was not necessary to preserve the right of the lands reserved or retained in Indian ownership. *The right to hunt and to fish was a part of the larger rights possessed by the Indians in the land used and occupied by them.*"

Such right was, "*not much less necessary to the Indian and his existence than the atmosphere they breathed remained in them unless granted away,*" United States vs. Winans, 198 United States 371, (OP., Acting Sol. IDM 28107, June 30, 1936).

The United States Supreme Court stated in United States vs. Winans, 198 United States 371, 381 (1905),

> "The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians . . . the reservation where in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein they imposed a servitude upon every piece of land as though described therein and the right was intended to be continuing against the United States and its grantee as well as against the State and its grantee."

The Supreme Court of the State of Wisconsin in a case involving the Chippewas cited as State vs. Johnson, 212 Wis. 301; 249 N. W. 285, held as follows:

> "While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they theretofore enjoyed we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights

with respect to the lands reserved to them at the time the treaty of 1854 was entered into and was not a shadow of impediment upon the hunting rights of the Indians on the lands retained by them, *The Treaty was not a grant of rights to the Indians but a grant of rights from them*, a reservation of those not granted. (U. S. v. Winans, 198 U. S. 371, 25 S. Ct. 662, 664; 49 L. Ed. 1089) We entertained no doubt the rights of Indians to hunt and fish upon their lands continued."

We will now consider whether the termination act, Public Law 399 and the subsequent amendments thereto, in any way limits the rights of the tribe as to their hunting and fishing privileges. It is the opinion of the court, first, that the Congress did not have a right to terminate or change the rights obtained by treaty. But if this opinion is differed with, may we point out that the act is strangely silent and neither directly or indirectly according to a fair interpretation of that act are the hunting and fishing privileges terminated. The preamble of the act provides,

"The purpose of this act is to provide for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."

Section 7 reads in part as follows,

". . . the responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof because of their status as Indians, shall cease on December 31, 1960 or on such earlier date as may be agreed upon by the tribe and by the secretary. The termination plan shall contain provisions for protection of the forest on a sustained yield basis and for the protection of water, soil, fish and wildlife."

The provisions of Section 7 providing that the termination plan shall contain provisions for the protection of the forest on a sustained yield and for the protection of water, soil, fish and wildlife, definitely indicates that soil, fish and wildlife are to be protected or reserved and this definitely indicates that this was considered and it naturally follows that it must be for the benefit of the tribe.

Section 8 directs that the Secretary of the Interior to transfer to the tribe the title to all property real or personal that is held in trust by the United States for the tribe, and specifically authorized the formation of a corporation for the purpose of taking title to all tribal lands and assets and enterprises owned by the tribe or held in trust by the United States.

The termination act did not eliminate exclusive hunting and fishing rights owned by the Menominees under the treaties of 1848 and 1854.

By termination the government saved the cost of supervision and so forth. This became a costly and serious obligation as time went along under the terms of the treaty. The termination on the part of the government is based not alone to obviate the costs of supervision, but also on the factual assumption that in today's modern way of living they are self-sustaining, that during years of supervision the government has so advanced and prepared them.

Almost any day in this court the silent tragedy continues. Young Indians, both male and female, and even the older ones with no employment supplement the modern way of life by theft and pawning. Fiscal aid by the government since termination is self-evident that the termination was premature. Hunting and fishing is not in itself a sufficient supplement to the modern way of life, but it does help.

The right of hunting and fishing is more important and vital to the Menominee than the right of all of Wisconsin or United States citizens to invade it.

The termination act provides in substance among other things that the property be conveyed or assigned as agreed on by the Menominees. Actually a corporation was formed designated as Menominee Enterprises, Inc., its stockholders being the enrolled members of the tribe at the time that the rolls were officially closed. The reservation therefore, was not actually allotted but it is still owned by the tribe. This mere conveyance is not a conveyance to a third party but to the Indians themselves. It should, also, be noted that there is provided in the act a way of life for the Indians by provision that the property be operated on a sustained yield. The other way of life, namely by hunting and fishing, is not in any way referred to. But the inclusion of the sustained yield is indicative that the termination act was intended to solidify the tribe in their holdings and in their use. We must, therefore, conclude that the termination act in no way terminated the hunting and fishing rights that are now at issue in this case.

As we have heretofore pointed out this issue has been the subject of controversy, litigation and decision on the part of both state and federal courts. One of the most recent decisions which this court feels embodies the facts and the principles of law involved is the case of the State of Oregon vs. Harry Pearson determined in the District Court of the State of Oregon for the County of Klamath. The defendant was accused of illegal possession of deer meat in the County of Klamath within the area formerly known as the Klamath Indian Reservation without having obtained a deer tag for the possession thereof. Quoting from the opinion as follows:

> "The question was whether the individual Indians who were members of the Klamath and Modoc Tribes

and Yahooskin Band of Snake Indians, hereafter referred to as the Klamath Indians, retain the right to hunt subsequent to the Klamath Termination Act as amended. (Title 25 U. S. C. A. 564).

"In aboriginal times up to the coming of the white man and through the period of recorded history, the Indians known as Klamath and Modoc Tribes and the Yahooskin Bank of Snakes, as Individuals possessed, according to their culture, a large portion of the states of Oregon and California and the right to hunt without restriction or control except that imposed by themselves was included in such possessions, according to their culture. The right to hunt was a substantial portion of their subsistence, and inured to succeeding generations up to and including the period following the treaty of 1864 and was practiced by members of the reservation up to the present time."

In the opinion the court quoted extensively the decision of State of Wisconsin vs. Johnson, 212 Wis. 301. Also the United States vs. Winans, and the court's concluding opinion is as follows,

"The case of United States vs. Winans and the above mentioned case both sustained the theory which this Court adopts that right or duties imposed on the Indians herein were not grants to them but from them to the government; therefore, that they have not granted away they still possess and any substantial right or possession, such as hunting, cannot be taken away by implication. Since the Klamath Termination Act as amended did not specifically provide for a grant away of the hunting and trapping rights with due and proper consideration therefore, it is the conclusion of this Court that they are still retained by the enrolled members only and they can exercise their heritage to hunt and trap within the areas of the former existing Klamath reservation without restriction by the State of Oregon."

In accordance with the foregoing opinions this court is of the opinion that the State of Wisconsin is without jurisdiction and that the defendants are not guilty of the crimes charged. Formal motion for dismissal and discharge of the defendants will be heard November 8, 1962, at 2:30 p.m.

Dated: November 1, 1962.

BY THE COURT:

R. H. FISCHER
County Judge

APPENDIX F

DECISION OF THE SUPREME COURT OF THE STATE OF WISCONSIN

November 1, 1963

ERROR to review two judgments of the county court of Shawano-Menominee counties: R. H. FISCHER, Judge. *Reversed.*

Criminal prosecutions by the state against defendants Joseph L. Sanapaw, William J. Grignon, and Francis Basina for violation of certain game laws.

The actions were commenced by complaint and warrant. Sanapaw and Grignon were charged together in one complaint, while Basina was charged singly in a separate complaint. All three were charged with hunting deer with the aid of an artificial light in violation of sec. WCD 10.10 (2), Wis. Adm. Code, and with transportation of a loaded and uncased gun in an automobile in violation of sec. WCD 10.07 (3), Wis. Adm. Code. Sanapaw and Grignon were charged with having committed their offenses on September 8, 1962, and Basina was charged with having committed his on September 9, 1962. Pleas of not guilty were entered. Defendants admitted, and the court found, that the alleged violations were in fact committed. The court, however, found defendants not guilty because they were enrolled members of the Menominee Indian Tribe and the state had no jurisdiction to enforce its hunting and fishing regulations against them.

The Court, pursuant to sec. 958.12 (1) (d), Stats., granted the state permission to prosecute writs of error to review the judgments of acquittal. By agreement of the parties the two writs of error have been submitted together because the cases present a common question of law.

CURRIE, J. The question presented by the writs of error is:

Upon termination of federal supervision and control over the Menominee Indian Tribe and the Menominee Indian Reservation, did the enrolled members of the Tribe and their lands become subject to the same Wisconsin game laws as other persons and lands within the state?

In order to resolve this question it is necessary to review the pertinent historical facts. These commence with the treaty of October 18, 1848, between the United States and the Menominee Tribe (9 U.S. Stat. at L. 952). By this treaty the Menominees ceded, sold and relinquished to the United States "all their lands in the State of Wisconsin wherever situated."[1] The treaty further provided that, in consideration for this cession, the United States give the Indians "for a home, to be held as Indians' lands are held" a large tract of land west of the Mississippi river, and that the Menominees "shall be permitted, if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof and until the President shall notify them that the same are wanted." In 1850 an exploring party found that the lands west of the mississippi were unsuited to the Menominees' circumstances. As a result they then petitioned the President for permission to stay longer on the ceded lands. Thereafter, Elias Murray, Superintendent of Indian Affairs, accompanied by three of the Menominee chiefs, explored lands on the Wolf and Oconto rivers in

[1] The boundaries of the area ceded to the United States under this treaty, which form a wedge-shaped tract located in east-central Wisconsin, are shown on Map "Wisconsin 1," Royce, *Indian Land Cessions*, Part 2, H. R. Doc. No. 118, Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution (1896-1897). The figure 271, which is superimposed upon this area of the map, is explained at pages 780-781. The approximate boundaries of this area are also shown on a smaller map appearing in Raney, *Wisconsin—A Story of Progress*, at page 78.

Wisconsin, and Murray recommended as a home for the Menominees a tract 30 by 18 miles, comprising fifteen townships.[2]

By further treaty made on May 12, 1854 (10 U.S. Stat. at L. 1064), the United States ceded to the Menominees a tract 24 by 18 miles on the Wolf river, consisting of twelve townships, "to be held as Indian Lands are held."[3] This 1854 treaty stated that its articles were "supplementary and amendatory" to the 1848 treaty. By the 1854 treaty the Menominees ceded back to the United States all lands west of the Mississippi. In 1856 the Menominees sold to the Stockbridge Indians two of their twelve townships. The remaining ten townships thus constituted the Menominee Indian Reservation. This reservation continued in existence until the "Termination Act" (68 U.S. Stat. at L. 250, as amended, 70 U.S. Stat. at L. 549, 72 U.S. Stat. at L. 290, 74 U.S. Stat. at L. 867; 25 U.S.C. secs. 891-902), passed originally by congress in 1954, became effective by the Secretary of Interior's proclamation of April 29, 1961 (26 Fed. Reg., No. 82, April 29, 1961, at page 3726). This proclamation proclaimed the transfer (pursuant to sec. 899 of the Termination Act) of all tribal property held in trust by the United States government, and the termination of all federal supervision and control over the Menominee Indians and the Menominee Indian Reservation effective midnight April 30, 1961. Title to the lands comprising the former Menominee Indian Reservation is now held by Menominee Enterprise, Inc., a Wisconsin corporation incorporated on January 23, 1961. The capital stock of this corporation is held in a voting trust for the benefit of the members of

[2] These facts are set forth in Menominee Tribe of Indians (1942), 95 Ct. of Cl. 232.

[3] This tract, less the two townships later sold to the Stockbridge Tribe, is shown on the Map designated as "Wisconsin 2" of Royce, Indian Land Cessions, referred to in footnote 1, and is designated on the map by the numeral 322.

the Menominee Indian Tribe. The acts committed by defendants which led to the instant criminal prosecutions occurred on these lands.

In view of the foregoing history we are faced with the preliminary question of whether, at the time the Termination Act became effective, the Menominees had exclusive hunting rights free from the state's game laws which arose either by reservation under the 1848 treaty (as modified by the 1854 treaty), or by cession under the 1854 treaty.

This court in *State* v. *Johnson* (1933), 212 Wis. 301, 249 N. W. 285, citing *United States* v. *Winans* (1905), 198 U.S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089, held that where Indians cede part of their lands by treaty and retain other lands, for their own use, as to which no government patents have ever been issued, their rights to fish and hunt on their retained lands, without being subject to the state's fish and game laws, continue even though the treaty contains no express reservation to that effect. We do not consider, however, that this principle has any application to the instant cases for two reasons. First, on the record before use, we cannot determine whether the lands where the alleged offenses were committed were part of the lands then owned by the Menominees at the time of the 1848 treaty. Only part of the former Menominee Indian reservation was included in the tract ceded to the United States by that treaty. The other part of the reservation consisted of lands which the Chippewa Indians had ceded to the United States by treaty made October 4, 1842.[4] Secondly, the 1848 treaty ceded all Menominee lands in Wisconsin to the United States, and the 1854

[4] This is apparent by comparing Maps "Wisconsin 1" and "Wisconsin 2" of Royce referred to in footnotes 1 and 3, and by referring to pages 776-777 of the text. The lands ceded by the Chippewas in 1842 is represented on Map "Wisconsin 1" by the tract bearing the numeral 261.

treaty did not abrogate this cession, but made an entirely new cession of the twelve townships to the Menominees. This is so even though the 1854 treaty stated that it was "supplementary and amendatory" to the 1848 treaty.

Therefore, if the Menominees, prior to the effective date of the Termination Act, had exclusive hunting rights over the lands embraced in their reservation free from the state's game laws, such rights must be grounded on the 1854 treaty provision whereby such lands were ceded to them "*to be held as Indian Lands are held.*" On the face of it this is an ambiguous provision. One permissible interpretation would be that the Menominees would enjoy the same rights with respect to the ceded lands as Indians are entitled to with respect to lands owned and occupied by them which have never been ceded by treaty. Among such rights would be that of hunting free from the restrictions of any state game laws. The rule of construction to be followed in interpreting Indian treaties is that in case of ambiguity they are to be interpreted in favor of the Indians. This was the holding in *Winters* v. *United States* (1908), 207 U.S. 564, 576-577, 28 Sup. Ct. 207, 52 L. Ed. 340, wherein the court declared:

> "By a rule in interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."

It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them "to be held as Indian

Lands are held." Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty.

This brings us to the crucial question of whether these exclusive rights to hunt free of the state's game laws were ended by the taking effect of the Termination Act. Congress has plenary power to deal with the Indians and may abrogate by statute Indian privileges and rights, including treaty rights. This principle was clearly enunciated in *Lone Wolf* v. *Hitchcock* (1903), 187 U.S. 553, 565-566, 23 Sup. Ct. 216, 47 L. Ed. 299, wherein the court stated:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U.S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas* v. *Gay*, 169 U.S. 264, 270; *Ward* v. *Race Horse*, 163 U.S. 504; 511; *Spalding* v. *Chandler*, 160 U.S. 394, 405; *Missouri, Kansas & Texas Ru. Co.* v. *Roberts*, 152 U.S. 114, 117; *The Cherokee Tobacco*, 11 Wall. 616."

For a recent federal case which acknowledges the existence of this plenary power of Congress over Indian tribes which cannot be limited by treaties, see *Anderson* v. *Gladden* (9th Cir. 1961), 293 Fed. (2d) 463, affirmed

by memorandum decision, 368 U.S. 949, 82 Sup. Ct. 390, 7 L. Ed. (2d) 344 (1961).

Sec. 891 of the Termination Act provides that the purpose "is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." Sec. 899 of the Act provides that upon the Secretary of the Interior publishing a proclamation in the Federal Register that all tribal property has been transferred in accordance with the Act, "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its mambers in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

The italicized statutory language, given its plain and ordinary meaning, would subject the Menominees' preexisting exclusive hunting rights to the state's game laws. However, defendants' counsel contends that the legislative history surrounding the enactment of the Termination Act precludes such an interpretation because it shows that this was not the intent of Congress.

The original bill, which was finally enacted by the 83rd Congress in 1954 as the Termination Act, originated in the House of Representatives as H. R. 2828. Two other companion bills to provide for the withdrawal of the Menominee Tribe from federal jurisdiction were also introduced, the one in the Senate being S. 2813, and the one in the House of Representatives being H. R. 7135. Joint hearings on all three bills were held before Subcommittee of the Committee on Interior and Insular Affairs of the Senate and the Subcommittee of the Committee on Interior and Insular Affairs of the House of Representatives on March 10th, 11th, and 12th, 1954. Both S. 2813 and H. R. 7135 contained express provisions which preserved any special hunting and fishing rights the Menominees

might have by treaty, statute, custom or judicial decision. H. R. 2828 contained no such corresponding provision. At pages 587-589, the printed report of the proceedings of this joint hearing [5] contains a letter dated March 5, 1954, addressed to the chairman of the House Committee on Interior and Insular Affairs by Orme Lewis, Assistant Secretary of the Interior, which explains the differences between the three bills, and mentions the difference in the treatment of hunting and fishing rights noted above. With respect to H. R. 2828 the letter states (p. 588):

> "H. R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have. If any special hunting and fishing rights have been granted by statute, however, they will be repealed by the provision of the bill making inapplicable all statutes that apply to Indians merely because of their status as Indians."

H. Rex Sigler of the Solicitor's Office, Department of Interior, gave this testimony at the joint hearing (at page 629):

> "The next difference relate to hunting and fishing rights. The earlier bill [H. R. 2828] does not say anything at all about the subject. It is silent. And by its silence it, in my judgment, makes no change in any treaty rights that may exist. However, the earlier bill will repeal any hunting and fishing rights that may have been granted by statute. I do not know of any such rights, but there is the general provision in the bill making inapplicable to these Indians Federal legislation that applies to Indians as such, which would affect any special statute that may be on the books. Again, I do not know of any such statute. It would not, however, in my judgment, af-

[5] "Joint Hearings Before the Subcommittee of the Committees on Interior and Insular Affairs, Congress of the United States, Eighty-Third Congress, Second Session on S. 2813, H. R. 2828 and H. R. 7135."

fect the treaty rights, which are not specifically mentioned but are not in conflict with this particular bill.

"The later bill, however, would specifically preserve all hunting and fishing rights granted not only by treaty but also by statute or custom or judicial decision. And to that extent, the bill would qualify the authority of the State to apply its conservation laws. So the issue, as I see it, is whether the Federal Government should specifically provide that hunting and fishing rights beyond treaty rights should be immune from State regulation."

Both the Lewis letter and the Sigler statement are favorable to the defendants' position. This is because both take the position that H.R. 2828 would not affect fishing and hunting rights conferred by treaty while it would effect those conferred by statute. Neither, however, specifically mentions the provision of the bill now found in sec. 899 of the Termination Act that *"the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction."* (Italics supplied.)

At the joint hearing Glen A. Wilkinson, attorney for the Menominee Tribe, submitted a written statement which is printed in full in the report of this hearing. In this written statement Wilkinson commented on that part of the Lewis letter, or report, of March 5, 1954, quoted above (at page 697):

". . . the statement is made that 'H. R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have.' Whether it 'purports' to affect such treaty rights seems immaterial; the fact is that it does, at least by implication, abolish the tribal rights to exclusive hunting and fishing privileges within the reservation —rights which were solemnly assured to the tribe in perpetuity."

Thus two conflicting interpretations of the effect of H. R. 2828 on the Menominees' fishing and hunting rights were presented at the joint hearing. Counsel for the defendants contends that the tribal representatives agreed to the interpretation of Lewis and Sigler. Wilkinson's statement seems to refute this. We are unable to find any proof that Congress in enacting H. R. 2828, without any express reference to hunting and fishing rights, intended to agree with the interpretation of Lewis and Sigler. An equally tenable inference is that Congress, in enacting the Termination Act which ended the status of the Menominees as wards of the United States, intended that whatever exclusive hunting and fishing rights the Indians possessed on their tribal lands should be subject to the same state conservation laws as are the hunting and fishing rights of any other landowners.

In considering the instant problem of interpretation we consider pertinent the preamble of House Concurrent Resolution 108, 83rd Congress, 1st Session, pursuant to which resolution H. R. 2828 was drafted and introduced:

> "Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and
>
> "Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens:" [6]

It is our conclusion that the express provision of sec. 899 of the Termination Act that "the laws of the several States shall apply to the tribe and its members in the

[6] This resolution is set forth in full at page III of the report of the joint hearing referred to in footnote 5.

same manner as they apply to other citizens or persons within their jurisdiction," includes the state conservation laws applicable to hunting. To this extent the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former tribal lands of the reservation. Whether the Menominees by reason of treaty still enjoy any special hunting rights over their former reservation lands, other than that of being free of such game laws, which were not abrogated by the Termination Act, we do not here decide.

By the Court.—Judgments reversed and causes remanded for further proceedings not inconsistent with this opinion.

* * * *

DIETRICH, J. (dissenting). I cannot agree with the majority decision that the Termination Act abrogates the rights of the Menominee Indians to exercise their hunting and fishing rights free from the state's game laws. The majority concedes that under the 1848 and 1854 treaties the hunting and fishing rights of the Menominee Indians were held free from state game law restrictions. The Termination Act of 1961, contains no reference to the subject, and does not purport to affect any treaty rights the Indians may have. The Termination Act is based on the assumption that during the years of government supervision of Indian affairs, the government has so advanced and prepared the Indians for modern living, that they have become self-sufficient. The amount of fiscal aid provided the Menominees in the short period since the enactment of the Termination Act is by itself sufficient to show the unsoundness of this assertion. While hunting and fishing is not in itself a sufficient supplement to the modern way of life, it does help. The rights of the Menominee Indian to hunt and fish on tribal lands far outweighs any need of the state of Wisconsin or any of its

agencies to invade these rights. This is especially so in that these rights were reserved to the Menominees under the treaties of 1848 and 1854.

An examination of the record discloses that the deed of forest lands from the United States to Menominee Enterprises, Inc., dated April 26, 1961, contains a provision prohibiting transfer of ownership of the lands for a period of thirty years without prior consent of the state conservation commission and approval of the Governor. The conveyances from Menominee Enterprises to the individual Menominee Indian landholders give Menominee Enterprises an option to repurchase the lands in the event that the grantees decide to sell. In other words, Menominee Enterprises exercises complete control over the lands. It should also be noted that the Termination Act provides a way of life for the Indians by a provision that the timberland be operated on a sustained yield basis. Their other way of life, namely by hunting and fishing, is not referred to at all. The conveyances give Menominee Enterprises complete control over transfer of the lands, and the sustained yield provisions of the Termination Act control the use of the lands. How, then, can this court say that the Indians have been given the same rights as other citizens of Wisconsin, when control over any transfer of their lands is to be held in trust for a period of thirty years, and when the use to which the Menominees may put these lands is closely regulated by the provisions of the Termination Act, and the Menominee Indians Assistant Trust. In effect, the Menominee Indians have not received full status as citizens, and under the facts of the instant case, retain their inherent tribal hunting and fishing rights, which were assured to them in perpetuity under the terms of the treaties of 1848 and 1854. I would affirm the judgment of the trial court.